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In the

# Supreme Court of the United States

**October Term, 1994**

WAL-MART STORES, INC.
d/b/a SAM'S WHOLESALE CLUB and/or
SAM'S WHOLESALE CLUB, a Division of
WAL-MART STORES, INC.,

*Petitioner,*

v.

KENT ANDREW FOLLETTE and JANE ELIZABETH FOLLETTE,
Individually and as Next Friend of
ANDREW STEPHENSON FOLLETTE, a Minor Child,

*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## Question Presented

In determining the preclusive effect of an earlier judgment of a federal court sitting in diversity, the Eighth Circuit in this diversity case applied the law of the state providing the substantive law underlying the earlier judgment. In so doing, the Eighth Circuit departed from the majority rule, which applies federal law to protect the interests of the federal system in determining the scope of its judgments. The Eighth Circuit also departed from the minority rule, which under *Erie* principles applies the law of the state in which the federal court in the second case sits.

Which law – of the three possibilities applied by the various circuits – determines the preclusive effect of an earlier judgment of a federal court sitting in diversity?

## List of Parties and Affiliates

The names of all parties appear in the case caption. Petitioner, Wal-Mart Stores, Inc., has no parent company. Under Supreme Court Rule 29.1, the subsidiaries of Wal-Mart Stores, Inc., other than wholly owned subsidiaries, are as follows:

Club Aurrera S.A. de C.V.
Commercializadora Mexico Americana S.A. de C.V.
Controladora Club Aurrera S.A. de C.V.
Immobiaiaria Capir S.A. de C.V.
Quality Licensing Corp.
Temple Beverages, Inc.
Wal-Mart Brazil, Inc.
Wal-Mart Ek Chor Company, Limited
Wal-Mart Ek Chor China Company Limited
Wal-Mart Ek Chor Hong Kong Company Limited
Wal-Mart Pharmacy of Michigan, Inc.
Wal-Mart Pharmacy (N.S.) Limited

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*Respondents.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

Wal-Mart Stores, Inc. hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

## OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, 1a-8a) is reported at 41 F.3d 1234, and its opinion on the motion for rehearing (App., *infra*, 33a-36a) is reported at 47 F.3d 311. The opinion, order, and judgment of the United States District Court for the

Eastern District of Arkansas (App., *infra*, 9a-17a) are unreported. With respect to the final judgment in the earlier personal-injury suit based on the same occurrence, the decision of the United States Court of Appeals for the Fifth Circuit (App., *infra*, 18a-19a) is noted at 998 F.2d 1014. The opinion of the United States District Court for the Western District of Louisiana (App., *infra*, 20a-32a) is reported at 829 F. Supp. 840.

## JURISDICTION

The Eighth Circuit Court of Appeals entered its initial opinion on December 6, 1994. In response to Wal-Mart Stores, Inc.'s timely petition for rehearing, the Eighth Circuit entered a second opinion on March 1, 1995, which clarified the first opinion on one point, and denied rehearing on all points raised in this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY AND CONSTITUTIONAL PROVISIONS

Section 1738 of 28 U.S.C. states:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The Full Faith and Credit Clause of the United States Constitution, art. IV, § 1, states:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

## Statement of the Case

This petition seeks review of the judgment of the United States Court of Appeals for the Eighth Circuit, which refused to give preclusive effect to an earlier final judgment of the United States Court of Appeals for the Fifth Circuit on the merits of the same personal-injury claim. Jurisdiction in the Arkansas federal district court was based on diversity of citizenship under 28 U.S.C. § 1332.

### I. The Earlier Fifth Circuit Judgment

Andrew Follette, a minor, was injured in an accident that occurred in Louisiana on August 21, 1989, involving a product allegedly purchased at a Louisiana Wal-Mart store.[1] On August 12, 1991, his parents, Kent and Jane Follette – who are Louisiana residents – filed a diversity suit against Wal-Mart, not in Louisiana, but in a Texas federal court.[2] They alleged claims individually and on behalf of their minor son.[3] As the Follettes admit, if they had filed suit in Louisiana, where their claims arose, their claims would have been barred by Louisiana's one-year prescription statute.[4] Instead, they filed their suit in Texas, attempting to secure the benefit of the two-year statute of limitations under Texas law.[5]

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[1] App. 21a.

[2] App. 21a.

[3] App. 20a.

[4] *See* App. 21a.

[5] App. 21a.

In the Texas trial court, Wal-Mart filed a motion to dismiss, or in the alternative, to transfer the case for lack of personal jurisdiction.[6] The Texas district judge transferred the case to the Western District of Louisiana under 28 U.S.C. § 1404(a), after concluding that the Texas court had personal jurisdiction based solely on Wal-Mart's qualifying to do business in Texas.[7]

After the Texas court transferred the case, the Fifth Circuit handed down its decision in *Siemer v. Learjet Acquisition Corp.*[8] In *Siemer*, the Fifth Circuit specifically held that qualifying to do business in Texas does not automatically subject a defendant to general personal jurisdiction of all Texas courts in all lawsuits.[9] Instead, according to *Siemer*, "a foreign corporation that properly complies with the Texas Registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible."[10]

Wal-Mart moved for summary judgment in the Louisiana trial court, based on the application of Louisiana's one-year prescription statute.[11] The district court granted this motion, for the reasons stated in the comprehensive Report and Recommendations of the Magistrate Judge.[12] Citing the Fifth Circuit's decision in *Siemer*, the Louisiana district court determined that the Texas district court had erroneously found that it had general personal jurisdiction over Wal-Mart.[13]

The Louisiana court then concluded that since the Texas court lacked personal jurisdiction over Wal-Mart, the Texas

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[6] App. 21a.

[7] App. 21a.

[8] *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

[9] *Id.* at 180-81.

[10] *Id.* at 183.

[11] App. 20a-21a.

[12] App. 20a-32a.

[13] App. 23a-32a.

two-year statute of limitations did not apply.[14] Instead, the Louisiana one-year prescription statute barred the Follettes' claims as a matter of law.[15] The Follettes appealed this decision to the Fifth Circuit, arguing that the Louisiana district court had failed to consider the "interest of justice" element of the transfer statutes. The Fifth Circuit rejected this argument and affirmed the Louisiana trial court's decision.[16] In the Louisiana district court and the Fifth Circuit, the Follettes elected not to challenge the original transfer decision or to seek retransfer.

Next, the Follettes filed a petition for writ of certiorari to the Supreme Court, arguing that their case had been unfairly transferred and that justice and equity required that their case not be dismissed.[17] This Court denied the Follettes' petition for writ of certiorari.[18] Thus, the Follettes fully litigated their personal-injury claim, and lost on the merits.

## II. The Proceedings Below

On August 18, 1993, the Follettes filed their second suit against Wal-Mart, this time in the United States District Court for the Eastern District of Arkansas. They alleged claims for breach of express and implied warranty based on the same accident and the identical facts involved in the previous suit. Wal-Mart responded with a motion to dismiss, or in the alternative, for summary judgment on the grounds of res judicata based on the final judgment of the Louisiana federal district court, as affirmed by the Fifth Circuit Court of

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[14] App. 32a.

[15] App. 32a; *see* La. Civ. Code Ann. art. 3492 (West Supp. 1995).

[16] *See* App. 18a-19a.

[17] Petition for a Writ of Certiorari, *Follette v. Clairol, Inc.*, No. 93-737, in the Supreme Court of the United States, October Term, 1993, at 10.

[18] *Follette v. Clairol, Inc.*, 114 S. Ct. 1187 (1994).

Appeals.[19] The Arkansas trial court granted summary judgment for Wal-Mart and dismissed the case with prejudice, concluding that the case was barred by res judicata.[20]

On appeal, the Eighth Circuit overturned the district court's ruling, finding that res judicata did not bar the Follettes' claims against Wal-Mart. It relied on the following choice-of-law rule: "When a federal court is sitting in diversity, the preclusive effect of a prior judgment is determined by the preclusion rules of the forum which provided the substantive law underlying that prior judgment."[21] The Eighth Circuit did not discuss either the majority position, which applies federal law to determine the preclusive effect of the earlier federal-court judgment, or the minority position, which under *Erie* principles applies the state law in which the deciding court sits. Indeed, the Eighth Circuit did not even acknowledge the fact that its choice-of-law rule conflicts with both positions.

As a result of adopting this aberrational rule, the Eighth Circuit applied Louisiana law to determine the preclusive effect of the earlier federal-court judgment. Based on its interpretation of a recently enacted "exceptional circumstances" exception to Louisiana's claim preclusion rules, the Eighth Circuit determined that a Louisiana state court would not have enforced the original Louisiana judgment based on limitations to preclude a later suit involving precisely the same facts.

## Reasons for Granting the Writ

The Eighth Circuit's decision in this case creates additional confusion and uncertainty as to the proper rule of decision for determining the preclusive effect of an earlier judgment of a federal court sitting in diversity. The Eighth

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[19] App. 12a.

[20] App. 12a, 15a. The trial court found, alternatively, that the case was barred by the Arkansas three-year statute of limitations for product liability actions. App. 14a-15a.

[21] App. 5a.

Circuit's rule directly conflicts with the rule of a majority of other circuits, which have concluded that if a litigant brings two successive diversity actions, federal law, not state law, determines the preclusive effect of the first diversity judgment. The Eighth Circuit's rule also contradicts the minority view, which looks to state rather than federal law, but is guided by the state law of the second forum, not the first.

The Eighth Circuit's decision undercuts one of the strongest policies of the independent federal judicial system – that of determining the scope and effect of its own judgments. The Court should grant a writ of certiorari to correct the error below, to resolve the direct three-way conflict among the circuits, and to establish a uniform federal rule of decision for this recurring and important question.

## I. The Conflicting Approaches of the Various Circuits

### A. Federal law determines the preclusive effect of a diversity judgment in the majority of circuits.

Eight of the twelve circuits apply federal law to determine the preclusive effect of an earlier judgment of a federal court, regardless of whether the federal court in the earlier case applied federal or state law.[22] Under this majority view, if two successive diversity actions are brought, federal law, not state law, determines the preclusive effect of the first diversity judgment. Courts applying federal law have concluded that preclusion rules involve procedural issues to which the *Erie* doctrine does not apply.[23]

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[22] *See, e.g., Johnson v. SCA Disposal Servs.*, 931 F.2d 970, 974 (1st Cir. 1991); *Kern v. Hettinger*, 303 F.2d 333, 340 (2d Cir. 1962); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1190 (4th Cir. 1989); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1045 (5th Cir. 1989); *Silcox v. United Trucking Serv., Inc.*, 687 F.2d 848, 852 (6th Cir. 1982); *Colonial Penn Life Ins. v. Hallmark Ins.*, 31 F.3d 445, 447 (7th Cir. 1994); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1332-33 (10th Cir. 1988); *Empire Fire & Marine Ins. Co. v. J. Transport*, 880 F.2d 1291, 1293 n.2 (11th Cir. 1989).

[23] *Lubrizol v. Exxon Corp.*, 929 F.2d 960, 962 n.2 (3d Cir. 1991).

As this Court has explained, "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction."[24] The Second Circuit has noted that one of the strongest policies of "an independent system" is the policy of determining the scope of its own judgments:

> It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. . . . [W]e think it would be a strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power . . . to enforce state created rights.[25]

The Fifth Circuit has echoed these concerns, articulating the dangers of allowing state law to determine the preclusive effect of a federal-court judgment, even in a diversity case:

> If state courts could eradicate the force and effect of federal court judgments through supervening interpretations of the state law of res judicata, federal courts would not be a reliable forum for final adjudication of a diversity litigant's claims.[26]

The *Restatement (Second) of Judgments* and commentators also advocate applying federal preclusion law to determine the effect of a federal diversity judgment, at least when the issue is not "clearly substantive," like the question of privity.[27]

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[24] *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537, 78 S. Ct. 893, 901 (1958).

[25] *Kern*, 303 F.2d at 340.

[26] *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975).

[27] *See Restatement (Second) of Judgments* § 87 cmt. b, at 317 (1982); 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal*

The Eighth Circuit's opinion never even acknowledges, much less offers any rationale for departing from, the established majority rule and its sound policy basis – that in the context of res judicata, the strong need for an independent federal system outweighs *Erie* considerations.

### B. Under the minority view applying state law, the law of the second forum, not the first forum, controls.

The Ninth Circuit has taken a different approach, concluding that in determining the preclusive effect of an earlier diversity judgment, a federal court sitting in diversity should, under *Erie*, apply state choice-of-law rules.[28] Under this view, *Erie* considerations outweigh the concern over the federal judicial system's independence. But under this *Erie*-based analysis, the law to be applied is the state law applied in the second diversity action, not the first. "This court has held that a federal court sitting in diversity must apply the res judicata law of the state in which it sits."[29] This analysis comports with *Erie* because under *Erie* principles, a federal court in a diversity case should apply the law of the state in which that court sits.[30] In this case, however, that would result in the application of Arkansas, not Louisiana, law.

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*Practice and Procedure* § 4472 (Supp. 1995); *cf.* 1B *Moore's Federal Practice* 0.410[1], at 362 (1984).

[28] *Gramm v. Lincoln*, 257 F.2d 250, 255 & n.6 (9th Cir. 1958); *see Bates v. Union Oil Co.*, 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 503 U.S. 1005 (1992); *Washington Public Power Supply Sys. v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989).

[29] *Washington Public Power*, 876 F.2d at 699; *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982); *see Bates*, 944 F.2d at 649.

[30] *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

### C. In the Third Circuit, where the question remains open, the choices are to apply federal law or to apply the state law of the second forum.

In the Third Circuit, the choice-of-law question on the res judicata effect of an earlier diversity judgment has not been definitely resolved. But in *Lubrizol v. Exxon Corp.*, a case in which Professor Charles Alan Wright advocated the application of federal law, the Third Circuit clarified both the majority and the minority views before deciding to leave the issue open.[31] Because the two diversity cases in *Lubrizol* were brought in two different states – as they were in the present case – the opinion clearly indicates that the court in the second diversity action must apply either federal law (under the majority view) or the law of the state in which the second court sits (under the minority view).

In *Lubrizol*, the first diversity action had been brought in a Texas district court. The second diversity action, which was based on the same facts, was brought in a New Jersey district court. The court noted that while there is disagreement over whether federal or state preclusion law applies in successive diversity actions, "the majority of appellate courts apply federal law, at least where the issues are not 'clearly substantive.'"[32] The court explained the Third Circuit's evolving position on this issue:

> In several cases, we have applied state law of preclusion when faced with successive diversity suits, but in none of these cases did we discuss the choice of law issue. In *Hartmann v. Time, Inc.*, 166 F.2d 127, 138 (3d Cir. 1947) . . . we held that state res judicata rules governed in successive diversity actions. *Accord Blum v. William Goldman Theatres, Inc.*, 174 F.2d 914, 915 (3d Cir. 1949). However, those cases were decided before *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S. Ct. 893 . . . (1958) and *Hanna v. Plumer*, 380

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[31] *Lubrizol v. Exxon Corp.*, 929 F.2d 960, 962-63 (3d Cir. 1991).

[32] *Id.* at 962.

> U.S. 460, 85 S. Ct. 1136 . . . (1965), established the current framework for determining which state rules are "substantive" for purposes of the *Erie* doctrine.[33]

While leaning toward the application of federal law, the Third Circuit concluded that it need not resolve the issue because the holding would be the same under either federal or state law.[34] More important, in considering the two possible rules, the Third Circuit compared federal law to the law of New Jersey – the state of the district court in the second diversity action.[35] The Third Circuit did not even consider the law of Texas – the forum of the first diversity action.[36] Thus, under the minority *Erie*-based view, a federal court sitting in diversity must look to its own state's law in determining the res judicata effect of an earlier diversity judgment. The Eighth Circuit's opinion does not acknowledge, much less attempt to justify, its departure from this minority rule.

### D. In the Eighth Circuit, the state law of the first forum controls the preclusive effect of an earlier diversity judgment.

The Eighth Circuit's opinion states: "When a federal court is sitting in diversity, the preclusive effect of a prior judgment is determined by the preclusion rules of the forum which provided the substantive law underlying that prior judgment."[37] This conclusion is novel and legally unsound.

The Eighth Circuit applied yet a third choice-of-law rule for successive diversity cases – one that conflicts both with the majority position (applying federal law) and with the

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[33] *Id.* at 962-63.

[34] *Id.* at 963.

[35] *Id.* at 963, 965.

[36] *Cf. Amader v. Johns-Manville Corp.*, 541 F. Supp. 1384, 1385, 1387 (E.D. Pa. 1982) (applying the collateral estoppel rules of Pennsylvania and not the collateral estoppel rules of the first federal forum – Texas).

[37] App. 5a.

minority position (applying the choice-of-law rule of the state in which the second federal court sits). Without valid support from any underlying principle such as the Full Faith and Credit Clause or the *Erie* doctrine, the Eighth Circuit has concluded that the second federal court should apply the law of the state in which the *first* federal court sat.

This aberrational rule ignores the independent judiciary principle underlying the majority rule and actually undercuts a basic *Erie* principle that supports the Ninth Circuit's minority rule – that a federal court sitting in diversity should reach the same result as would the state court in the relevant jurisdiction. Had the Follettes actually filed their second suit in Louisiana state court, they undoubtedly would have lost again, on grounds of limitations if not on grounds of res judicata. Yet the Eighth Circuit, purportedly applying Louisiana law, ruled that they may pursue the second suit and potentially obtain a judgment for damages, a result directly contrary to the one a Louisiana state court would reach.

One authority cited for the Eighth Circuit's choice-of-law holding on res judicata was developed in a different context. A federal court must indeed sometimes look to the state law of the first forum to determine the preclusive effect of an earlier judgment – but only if the first forum is actually a state court:

> It has long been the law that 'the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced.' This rule, if not compelled by the Full Faith and Credit Clause itself, is surely required by 28 U.S.C. § 1738.[38]

As this Court has explained, "Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their

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[38] *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 270, 100 S. Ct. 2647, 2655 (1980) (citations omitted).

own courts."[39] Thus, as federal courts have consistently held, "[f]ederal courts must give a state court judgment the same preclusive effect as would a court of the state in which the judgment was handed down."[40]

The Eighth Circuit's citation of *Hicks v. O'Meara* as authority for its choice-of-law determination indicates a misplaced reliance on the above rule.[41] That case properly applied the rule to determine the preclusive effect of an earlier state-court judgment. In this case, the Eighth Circuit has illogically concluded that state law should apply even when the first judgment is from a federal, not a state, court.

The opinion below also cites another recent Eighth Circuit case, *Austin v. Super Valu Stores, Inc.*, which did involve an earlier federal-court judgment.[42] The *Austin* court relied on *Semler v. Psychiatric Institute of Washington, D.C., Inc.*, a 1978 opinion of the D.C. Circuit.[43] But in a more recent opinion, the D.C. Circuit tacitly abandoned the analysis of *Semler*, adopting instead the majority view on this issue:

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[39] *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380, 105 S. Ct. 1327, 1331-32 (1985); *see Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 482-83 n.24, 102 S. Ct. 1883, 1898 n.24 (1982) (discussing 28 U.S.C. § 1738).

[40] *Dyer v. Intera Corp.*, 870 F.2d 1063, 1066 (6th Cir. 1989); *see Cable Holdings of Battlefield, Inc. v. Cooke*, 764 F.2d 1466, 1473-75 & n.21 (11th Cir. 1985); *Rollins v. Dwyer*, 666 F.2d 141, 144 (5th Cir. 1982).

[41] App. 5a (citing *Hicks v. O'Meara*, 31 F.3d 744, 746 (8th Cir. 1994)).

[42] App. 5a (citing *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 617-18 (8th Cir. 1994)).

[43] *Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 618 (8th Cir. 1994) (citing *Semler v. Psychiatric Inst. of Washington, D.C., Inc.*, 575 F.2d 922 (D.C. Cir. 1978)). *Semler* suggests that the Full Faith and Credit Clause, as codified at 28 U.S.C. § 1738, applies in considering the preclusive effect of an earlier diversity judgment. *Semler*, 575 F.2d at 927-28. Other circuits, however, have either explicitly or impliedly rejected this analysis. *See Williams v. Ocean Transp. Lines, Inc.*, 425 F.2d 1183, 1185-90 (3d Cir. 1970).

> [T]he Second and Fifth Circuits have concluded that the federal law of res judicata controls. In reaching the same conclusion, we join a burgeoning majority of federal courts. . . . We hold, therefore, that the federal court in exercising its diversity jurisdiction here shall apply federal rules of res judicata in determining the effect to be given the judgment rendered by the federal court in Florida exercising diversity jurisdiction. Such holding comports with well-reasoned precedent from other circuits.[44]

In a case decided the next year, Judge Mikva attempted to harmonize *Semler* and *Hunt*, concluding that "*Erie* requires the use of all of a state's substantive law – including those aspects of its res judicata and preclusion law that can be characterized as substantive – whenever the cause of action at issue is state created."[45] Judge Scalia concurred in the result only, expressing his "doubts about the validity of the majority's *Erie* analysis."[46] As Judge Scalia explained, "I am predisposed to believe that the mandatory joinder of one claim to another is a federal matter under *Erie* . . . . "[47] The D.C. Circuit, itself, is thus apparently divided over whether *Erie* mandates the application of state law under these circumstances. In any event, neither the inapplicable rule of *Hicks* nor the criticized *Semler* analysis relied on in *Austin* provides any valid reason for a choice-of-law rule that depends on the state law of the first federal forum.

Obviously sympathetic to a seriously injured minor, the Eighth Circuit used an insupportable choice-of-law rule to select Louisiana res judicata law as controlling. The Eighth Circuit then interpreted a very recent statutory exception to Louisiana res judicata law – an exception that does not exist

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[44] *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1496-97 (D.C. Cir. 1983).

[45] *Answering Service, Inc. v. Egan*, 728 F.2d 1500, 1506 (D.C. Cir. 1984).

[46] *Id.* (Scalia, J., concurring).

[47] *Id.* at 1507.

under federal law or Arkansas law – to allow a second lawsuit based on the same facts. The Eighth Circuit interpreted Louisiana law to allow a second lawsuit, even though in the first lawsuit, a Louisiana federal court applied Louisiana limitations to bar the Follettes' claims. In essence, the Eighth Circuit denied preclusive effect to the final judgment of the Louisiana federal court based on its conclusion that the earlier court's decision on limitations was substantively erroneous.

The panel applied the Louisiana exception apparently based on its own conclusion that the Texas district court's jurisdictional and transfer rulings constituted an "unusual error."[48] The Eighth Circuit also suggested that the Follettes had no obligation in the first lawsuit to seek retransfer or dismissal without prejudice in the first case because existing Fifth Circuit precedent was unfavorable to them on those issues.[49] At oral argument, the Eighth Circuit panel expressed further skepticism over the correctness of the Fifth Circuit's intervening jurisdictional analysis in *Siemer v. Learjet Acquisition Corp.*[50]

But even if an "unusual error" occurred in the first case, the only proper redress for that error was through an appeal and a petition for certiorari in the first proceeding, not through a collateral lawsuit in a sister circuit. Any "clearly erroneous prior judgment" exception directly undercuts the very foundation of the res judicata doctrine, as this Court has long recognized.[51] And the federal system would be dangerously harmed if one circuit could allow litigants to bring a second lawsuit on the same facts merely because that circuit disagreed with the law or results of the sister circuit that decided the earlier case.

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[48] App. 7a.

[49] App. 7a n.2.

[50] *See Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993).

[51] *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398-99, 101 S. Ct. 2424, 2427 (1981).

## II. The Importance of the Issue

Important federal policies clash in the analysis of the appropriate law for federal courts to apply in determining the scope of an earlier judgment of a federal court sitting in diversity. The majority view recognizes the critical need for an independent federal system that can consistently and uniformly determine the scope of its own judgments.[52] But underlying the minority view are other important policies, including the requirement under *Erie* that a federal court sitting in diversity should apply the substantive law of the state in which its sits. Ignoring these conflicting rules and policies, the Eighth Circuit in this case has taken a third path that severely undercuts the concerns underlying both the majority and the minority positions. The Eighth Circuit has thus exacerbated the conflict and uncertainty among the circuits on this issue.

Under the present conflicting standards, the preclusive effect of a diversity judgment varies from circuit to circuit across the nation. This lack of uniformity raises serious concerns about forum-shopping and about the reliability of a federal forum for the final adjudication of claims. This case presents the choice-of-law issue clearly because the two successive diversity cases at issue were brought in different states. It thus allows this Court to determine whether federal law applies (under the majority view), whether Arkansas law applies (under the minority view), or whether Louisiana law applies (under the Eighth Circuit's rule).

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[52] *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537, 78 S. Ct. 893, 901 (1958).

## Conclusion

Whether the scope of federal judgments will be determined by one uniform federal law or by fifty separate state laws is an issue that affects the scope and finality of every federal diversity judgment. This Court should grant the Petition for Certiorari, correct the error of the Eighth Circuit, and establish a uniform rule of decision that requires the application of federal law. Only in this way can the Court ensure the independence of the federal judiciary and provide uniformity in the preclusive effects of federal-court judgments.

Respectfully submitted,

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**Kent Andrew FOLLETTE, individually and as next friend of Andrew Stephenson Follette, a minor child; Jane Elizabeth Follette, individually and as next friend of Andrew Stephenson Follette, a minor child, Appellants,**

**v.**

**WAL-MART STORES, INC., doing business as Sam's Wholesale Club, a division of Wal-Mart Stores, Inc., Appellees.**

**No. 94-1458.**

United States Court of Appeals,
Eighth Circuit.

Submitted Sept. 16, 1994.

Decided Dec. 6, 1994.

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and BEAM, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The plaintiffs, Kent and Jane Follette, brought this breach of warranty suit on behalf of their minor son, Andrew. They now appeal the grant of a motion for summary judgment filed by the defendant, Wal-Mart. The District Court held that the Follettes' cause of action was barred by res judicata. Alternatively, that Court held that the suit was barred by the Arkansas statute of limitations. For the reasons set forth below, we reverse and remand the case for further proceedings.

I.

The Follettes allege that on August 21, 1989, a jug of hairspray purchased from Wal-Mart exploded, causing injuries to their minor son Andrew. Unfortunately for their case, they allowed the one-year Louisiana limitations period to run before pursuing their claims against Wal-Mart. Thus began the odd and complicated series of procedural events which culminate in the case before us.

The Follettes filed their original suit in the United States District Court for the Eastern District of Texas in order to avoid Louisiana's one-year limitations period. Wal-Mart moved to dismiss the suit based on a lack of jurisdiction over the person of the defendant. The Texas court denied this motion, holding that Wal-Mart had consented to the general jurisdiction of the Texas courts by virtue of its being licensed to do business in Texas. (It later became clear that this holding was erroneous according to Fifth Circuit law.) The Texas court then transferred the case, pursuant to 28 U.S.C. § 1404(a), to the United States District Court for the Western District of Louisiana on the ground that it was a more convenient forum.

This transfer, combined with the erroneous ruling on personal jurisdiction, proved fatal to the Follettes' suit. Soon after the transfer, the United States Court of Appeals for the Fifth Circuit held that a foreign corporation does not consent to the general jurisdiction of a state merely by registering to do business in that state and appointing an agent for the service of process in that state. *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1047, 122 L.Ed.2d 356 (1993). Subsequently, the Louisiana court granted Wal-Mart's motion for summary judgment, reasoning that, since the Texas court never had jurisdiction over the person of Wal-Mart, the Louisiana court was free to apply the Louisiana limitations period and dismiss the case. 829 F.Supp. 840 (W.D.La.), *aff'd without opinion*, 998 F.2d 1014 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1187, 127 L.Ed.2d 537 (1994). (Normally the law of the transferor forum follows a case transferred under Section 1404(a), but that is not true when the transferor court lacked jurisdiction.)

The Follettes then filed this suit on August 18, 1993, in the United States District Court for the Eastern District of Arkansas. For the first time, they allege a breach of the implied warranty of merchantability found in Article 2 of the Uniform Commercial Code (U.C.C.). They did not advance this theory in the previous case because Louisiana has not adopted Article 2. In order to recover damages for personal

injury from a non-manufacturing seller in Louisiana, a plaintiff must prove negligence. *Jones v. Menard*, 559 F.2d 1282, 1284 (5th Cir.1977).

Citing the general rule against claim splitting, the Arkansas court held that the Follettes' warranty claim arose from the same transaction as the previously litigated tort claims, which were dismissed with prejudice in the Louisiana suit. Thus, the warranty claims should have been asserted along with the tort claims in the original suit. As a result, the Arkansas court held that res judicata prevents their assertion now.

Alternatively, the Arkansas court held that the Arkansas statute of limitations had expired before the Follettes filed their warranty suit. According to the court, breach-of-warranty actions which seek damages for personal injury are products-liability actions under Arkansas law. As such, they are subject to the three-year limitations period found in the Product Liability Act of 1979. Ark.Code Ann. § 16-116-103. This suit was filed nearly four years after the sale of the product and the injury occurred.

II.

We first consider whether the Follettes' warranty claims were filed within the Arkansas limitations period. We give plenary review to a district court's determination of state law. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991). The Follettes argue that the general four-year limitations period found in the UCC governs this case. Ark.Code Ann. § 4-2-725. We hold that the three-year statute of limitations found in the Product Liability Act governs a breach-of-warranty suit when damages for personal injury are sought. Ark.Code Ann. § 16-116-103. The Product Liability Act is both more specific and more recent than Arkansas's adoption of the Uniform Commercial Code.

The Product Liability Act defines products-liability actions as "all actions brought for or on account of personal injury . . . caused by, or resulting from, the manufacture, construction, design, formula, preparation, assembly, testing,

service, warning, instruction, *marketing*, packaging, or labeling of any product. . . . " Ark.Code Ann. § 16-116-102(5) (emphasis added). Wal-Mart, as a seller of the product in this case, is "marketing" the product. *Webster's Third New International Dictionary* 1383 (1976). The Follettes' cause of action is for "personal injury" to their son "resulting from" that sale. Thus, it is a products-liability action under Arkansas law. The Act then mandates that "all" products-liability actions "shall" be filed within three years of the injury. Ark.Code Ann. § 16-116-103. That three-year period, the Arkansas court correctly held, would normally govern this case. *Accord, Harris v. Standardized Sanitation Systems, Inc.*, 658 F.Supp. 438, 439 (W.D.Ark.1987); Joseph Heimann, Legislative Note, *The Arkansas Product Liability Act of 1979*, 35 Ark.L.Rev. 364, 368 (1981).

If the Follettes were suing on their own behalf, this holding would end the matter. This suit, however, was brought on behalf of the Follettes' minor son. They argue, therefore, that Arkansas's general savings statute prevents the running of the three-year limitations period. We agree.

The Arkansas savings statute provides that any minor entitled to bring an action may do so within three years after coming of age. See Ark.Code Ann. § 16-56-116. It applies to "any cause of action," *Graham v. Sisco*, 248 Ark. 6, 8, 449 S.W.2d 949, 950 (1970), unless "a statutory right of action is given, which did not exist at common law, and the statute giving the right also fixes the time within which the right may be enforced. . . . " *Anthony v. St. Louis, Iron Mountain & Southern Railway Co.*, 108 Ark. 219, 221, 157 S.W. 394, 394 (1913). The savings statute applies to the case before us because an action for breach of the implied warranty of merchantability "exist[ed] at common law." *Id.*; see *Neel v. West-Winfree Tobacco Co.*, 142 Ark. 505, 508, 219 S.W. 326, 327 (1920) (finding common-law breach of implied warranty).

The Arkansas Supreme Court case of *Graham v. Sisco, supra*, is instructive. There, the parents of a minor allegedly injured by the malpractice of a doctor brought suit on behalf of the minor after the ordinary statute of limitations for

malpractice actions had run. The Court found that the suit was timely because of the savings statute. This was so even though there was a specific limitations period for malpractice actions. See Ark.Stat.Ann. § 34-2616 (superseded by Ark.Code Ann § 16-114-203). In a later opinion the same court explained that its holding in *Graham* was dictated by the fact that malpractice actions have their roots in the common law and "are not statutory in origin." *Sandusky v. First Electric Cooperative*, 266 Ark. 588, 591, 587 S.W.2d 37, 38 (1979).

Likewise, the Follettes are suing on behalf of their minor son. The theory they advance, breach of the implied warranty of merchantability, has its roots in the common law, though it has been changed by a statutory scheme, the U.C.C. Thus, the savings statute applies to prevent the limitations period from running.

III.

We are left, then, to consider whether the prior Louisiana decision precludes the claim that the Follettes now assert. When a federal court is sitting in diversity, the preclusive effect of a prior judgment is determined by the preclusion rules of the forum which provided the substantive law underlying that prior judgment. *Hicks v. O'Meara*, 31 F.3d 744, 746 (8th Cir.1994). This rule applies when the original judgment is that of another federal court sitting in diversity. *Austin v. Super Valu Stores*, 31 F.3d 615, 617-18 (1994).[1] Thus, the

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[1] Wal-Mart contends that our holding in *Austin* is in conflict with *Lane v. Peterson*, 899 F.2d 737 (8th Cir.), *cert. denied*, 498 U.S. 823, 111 S.Ct. 74, 112 L.Ed.2d 48 (1990). Wal-Mart reads too much into *Peterson*. There, we never addressed the issue of whether state or federal law controlled. Rather, we applied general principles of res judicata. Additionally, we find it instructive that the same panel, a mere ten days later, in a connected case, specifically held that state collateral-estoppel rules should apply when a federal court is sitting in diversity. *Lane v. Sullivan*, 900 F.2d 1247, 1250 (8th Cir.), *cert. denied*, 498 U.S. 847, 111 S.Ct. 134, 112 L.Ed.2d 101 (1990). We reject Wal-Mart's argument that res judicata

question in this case is whether the Louisiana state courts would give preclusive effect to the original judgment. We conclude that they would not.

Louisiana's general rule of claim preclusion is virtually identical to that of the Restatement 2d of Judgments. All actions arising from the same "transaction or occurrence that is the subject matter" of a prior judgment are barred. La.Rev.Stat. § 13:4231. However, this rule does not apply "when exceptional circumstances" exist. La.Rev.Stat. § 13:4232A(1). This exception to the general rule "is necessary to allow the court to balance the principle of res judicata with the interests of justice." Comment on La.Rev.Stat. § 13:4232. The case before us involves one such "exceptional circumstance."

An examination of the Louisiana cases defining exceptional circumstances mandates the decision we reach today. For example, in *Jenkins v. State*, 615 So.2d 405 (La.App.1993), the plaintiff was allowed to pursue his second suit in spite of a prior dismissal with prejudice for failure to prosecute. In reaching its decision, the Louisiana Court of Appeals noted that the plaintiff alleged "a horrendous injustice" (fraudulent conviction of murder and 30 years in prison) and that "his predicament is the result of his attorney's conduct and not his own." *Id.* at 406-07. In *Billiot v. Lebeouf Brothers Towing Co.*, 640 So.2d 826 (La.App.1994), the exceptional-circumstances clause was applied where the prior federal court action for violation of the Longshore and Harbor

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and collateral-estoppel are distinguishable for this purpose, that, while state law determines the collateral-estoppel effect of the judgment of a federal court in a case where state law supplied the rule of decision, federal law determines the res judicata effect of such a judgment. The two doctrines – res judicata and collateral estoppel – are simply two aspects of the law of former adjudication. It is impossible to distinguish them for present purposes. This Court has consistently looked to state law to determine the effect of the judgment of another federal court in a case where state law supplied the rule of decision. "Eighth Circuit decisions have consistently referred the question to state law." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4472, at p. 550 (1994 Supp.).

Workers' Compensation Act was dismissed with prejudice because one defendant was not the employer of the deceased worker and the other was immune from liability under that Act. In the opinion of the Louisiana Court of Appeals, the prior judgment should have been without prejudice because it was a mere procedural recognition of no right of action. The merits of the plaintiffs' claims had not been reached. Thus, the plaintiffs were allowed to pursue their Jones Act claims in a second suit. Otherwise, res judicata would forever bar the plaintiffs "from asserting their claims arising from the alleged wrongful death of their husband and father." *Id.* at 829. Such a result would be a "procedural windfall" to the defendant. *Id.*

Likewise, in the case before us, the Follettes find themselves in a bizarre predicament. The predicament in this case was caused by the error of a court. The correct course of action for the Texas federal court would have been either to dismiss the suit for want of personal jurisdiction, or to transfer the suit to another jurisdiction where personal jurisdiction and venue did exist, the Eastern District of Arkansas, for example. 28 U.S.C. §§ 1404(a), 1406(a); *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962); *Turner v. McClain,* 459 F.Supp. 898, 901-02 (E.D.Ark.1978). In either event, the case could have gone forward in Arkansas, where it is not barred by limitations.[2] See also Ark.Code Ann. § 16-56-126 (providing an additional year in which to file suit following a dismissal without prejudice). This kind of unusual error by a court seems to us a more compelling reason for finding an exceptional circumstance than does the attorney's

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[2] Wal-Mart also argues that the Follettes should have requested a re-transfer or sought a voluntary dismissal after Wal-Mart filed its motion for summary judgment in Louisiana. Any such action would have been futile. The Louisiana court made it clear that no re-transfer would be granted. A dismissal without prejudice was available only by order of the court because Wal-Mart had moved for summary judgment, Fed.R.Civ.P. 41(a)(2), and the Fifth Circuit has made it clear that avoiding a statute-of-limitations defense is the sort of "clear legal prejudice" which precludes a dismissal without prejudice by order of the court. *Phillips v. Illinois Central Gulf Railroad,* 874 F.2d 984, 987 (5th Cir.1989).

error in *Jenkins*. In addition, just as in *Billiot*, the merits of the Follettes' case have never been addressed. Rather, the Louisiana court found that the suit was untimely. Finally, as in each of the cases discussed, the injury alleged is quite serious. The Follettes' minor son was burned over 80% of his body, causing great pain and disfigurement. If we were to allow res judicata to bar this suit, he would be forever barred from asserting his claims arising from those injuries. These factors, in our judgment, combine to create a truly exceptional circumstance. We do not believe that the law of Louisiana, which seems to us markedly forgiving in this respect, would countenance the barring of this claim because of the highly unusual interplay of transfer and jurisdictional doctrines that took place in this case.

IV.

For the reasons stated above, we find that the Follettes' case is not barred by the Arkansas statute of limitations. Furthermore, exceptional circumstances exist precluding the application of res judicata in this case. Therefore, we reverse the judgment of the District Court and remand this case for further proceedings.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KENT ANDREW FOLLETTE and
JANE ELIZABETH FOLLETTE,
Individually and as Next
Friend of ANDREW STEPHENSON
FOLLETTE, A Minor Child

PLAINTIFFS

v. LR-C-93-577

WAL-MART STORES, INC. d/b/a
SAM'S WHOLESALE CLUB and/or
SAM'S WHOLESALE CLUB, A
Division of WAL-MART
STORES, INC.

DEFENDANT

MEMORANDUM OPINION

(Filed Jan. 13, 1994)

FACTS

The plaintiffs are residents of Louisiana. Wal-Mart is a Delaware Corporation and its principal place of business is in Arkansas. Clairol, Inc. ("Clairol") is also a Delaware corporation and its principal place of business is in New York. Clairol manufactures "Final Net," a liquid hairspray. Plaintiffs allege that they purchased a can of "Final Net" from Sam's Wholesale Club "Sam's") a division of Wal-Mart in Louisiana. They claim that the can exploded in their home on August 21, 1989, the date of purchase. Their minor child, Andrew Stephenson Follette, was seriously injured in the explosion.

On August 12, 1991, Wal-Mart and Clairol were sued by plaintiffs in the United States District Court for the Eastern District of Texas for injuries to the plaintiffs' son. The theory of the complaint was strict liability and negligence. Wal-Mart and Clairol filed motions to dismiss or, in the alternative,

motions to transfer, contending that a Texas court had neither *in personam* jurisdiction over them nor any viable interest in this proceeding. U. S. District Judge Sam Hall denied the motions, concluding that a Texas court could exercise *in personam* jurisdiction, but then transferred the case to the Western District of Louisiana under the doctrine of *forum non conveniens*. The United States District Judge in Louisiana referred the case to United States Magistrate Alonzo P. Wilson. Wal-Mart and Clairol filed motions for summary judgment. In a report and recommendation to the district judge about the motions, Judge Wilson framed the key issue in the following manner:

> The obvious purpose for filing the suit in Texas was to secure the benefit of Texas' two year prescriptive [proscriptive] period. Had plaintiffs filed this suit in Louisiana their claims against both Clairol and Wal-Mart would have been prescribed [proscribed]. However, under Texas' choice of law rules, the Texas court would be required to apply Texas' two year statute of limitations. [Citations omitted].
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> . . .
>
> Both Clairol and Wal-Mart now contend that the claims against them have prescribed [been proscribed]. The prescription [proscriptive] issue turns on whether Louisiana's one year statute of limitations [citations omitted] or Texas' two year statute of limitations [citations omitted] applies. The question of which prescriptive [proscriptive] period applies, in turn, depends upon whether a Texas court could constitutionally exercise *in personam* jurisdiction over each of the defendants.
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> If Texas could constitutionally exercise *in personam* jurisdiction over the defendants, this court is required to apply the Texas statute of limitations. [Citations omitted]. On the other hand, if the defendants were not subject to the *in personam* jurisdiction of the Texas court then the Louisiana statute of limitations applies. [Citation omitted]. Thus, we

> reach the issue of *in personam* jurisdiction in an effort to decide whether the plaintiffs' claims have prescribed [been proscribed].

Report and Recommendation at 1-3.[1]

Judge Wilson determined that an intervening Fifth Circuit decision, *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1047 (1993), demanded an outcome different than that reached by Judge Hall. Specifically, Judge Wilson determined that the forum in which the case was first filed, *i.e.*, Texas, had no relationship to the litigation, and a Texas court thus could not constitutionally exercise *in personam* jurisdiction over either defendant.

Consequently, he held that Louisiana's one-year statute of limitations was applicable and the plaintiffs' claims were barred. He recommended that the motions for summary judgment be granted and the complaint be dismissed with prejudice. Judge Wilson's Report and Recommendation was adopted by the district judge, and the complaint was dismissed with prejudice. The plaintiffs appealed.

In an unpublished, *per curiam* opinion filed in July of 1993, the Fifth Circuit Court of Appeals affirmed the judgment.[2] On August 18, 1993, the plaintiffs filed the present

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[1] As the Court has noted, Judge Hall concluded that a Texas court could exercise *in personam* jurisdiction over Wal-Mart and Clairol. After the case was transferred to Louisiana, Judge Wilson decided to revisit the jurisdiction issue. The plaintiffs challenged that decision, taking the position that the issue had been decided by Judge Hall and was therefore the law of the case. Judge Wilson acknowledged that Judge Hall's finding should not ordinarily be revisited but an intervening Fifth Circuit decision demanded a second look at the issue.

[2] That opinion provides, in full:

> The plaintiff parents sued Clairol, Inc. ("Clairol"), and Walmart Stores, Inc. ("Walmart"), in the United States District Court for the Eastern District of Texas, on the basis of diversity jurisdiction, for injuries allegedly sustained by their child from the explosion in Louisiana of a jug of hair spray. The

complaint at bar against Wal-Mart for their son's injuries in the explosion. The complaint was based upon claims of breach of warranty, both express and implied.

## DISCUSSION

Defendants have filed motions for summary judgment on the ground that the Louisiana federal court's decisions are *res judicata* as to the instant complaint. Although we sympathize with the predicament in which the badly injured minor plaintiff finds himself, the case law dictates that the defendants' summary judgment motions must be granted. The same operative facts are present in this case as were present in the Louisiana case. Both were product liability cases growing out of injuries sustained by reason of a defective product. Both the Eighth and Fifth Circuits apply *res judicata* when three criteria are met:

(1) the prior judgment was rendered by a court of competent jurisdiction;

(2) the prior judgment was a final decision on the merits; and

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defendants moved to dismiss for want of personal jurisdiction. The district court, finding an inconvenient forum, transferred the matter to the United States District Court for the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a).

In light of the intervening decision in *Siemer v. Learjet Acquisition Corp.*, [citation omitted], the district court held that the Texas court never had acquired personal jurisdiction over the defendant and that, accordingly, the Louisiana federal court was free to apply Louisiana's one-year prescriptive [proscriptive] period. The court thus granted defendants' motion for summary judgment on the grounds of prescription [proscription].

The district court based its judgment upon the reasons given by the magistrate judge in his comprehensive, sixteen-page Report and Recommendation entered February 2, 1993, We find the magistrate judge's analysis persuasive, and we AFFIRM essentially for the reasons set forth in that report.

(3) the same cause of action and the same parties are involved in both cases.

*Lane v. Peterson,* 899 F.2d 737, 742 (8th Cir.), *cert. denied,* 498 U.S. 823 (1990); *Murphy v. Jones,* 877 F.2d 682, 684 (8th Cir. 1989).

The important subsidiary question in this case is whether a judgment based on the statute of limitations is a judgment on the merits. Clearly, it is such a judgment. *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.,* 870 F.2d 1044, 1046 (5th Cir. 1989); *Fansher v. Kassel,* 782 F. Supp. 1334, 1336 (E.D. Mo. 1992). See particularly the cases cited in the latter case at 1336 of the opinion.

Plaintiffs seek to avoid the application of *res judicata* here by substituting the theories of express and implied warranties for previous claims of negligence and strict liability asserted in the original complaint, but the facts in both complaints are identical. The Eighth Circuit has explicitly adopted the Restatement's transactional definition of "claim." *Lane v. Peterson,* 737, 742, 899 F.2d 742. The Court explained:

> One of the merits of the Restatement (Second)'s approach is that it prevents parties from suing on a claim that is in essence the same as a previously litigated claim but is dressed up to look different. Thus, where a plaintiff fashions a new theory of recovery or cites a new body of law that was arguably violated by a defendant's conduct, *res judicata* will still bar the second claim if it is based on the same nucleus of operative facts as the prior claim.

*Lane,* 899 F.2d at 744. Since its adoption, the "same nucleus of operative facts" standard has consistently been applied by the Eighth Circuit. *Murphy v. Jones,* 877 F.2d at 684-85 (8th Cir. 1989); *Hufsmith v. Weaver,* 817 F.2d 455, 461 (8th Cir. 1987). This standard bars the relitigation of claims that could have been litigated in the first proceeding, as well as those that actually were. *Armstrong v. Norwest Bank, Minneapolis, N.A.,* 964 F.2d 797, 802 (8th Cir. 1992).

In this case a warranty claim could have been asserted in both Texas and Louisiana. Texas, like Arkansas, has enacted

section 2 of the Uniform Commercial Code. While Louisiana has not enacted this section, warranty is contained in the state's redhibition statutes. *Jones v. Menard,* 559 F.2d 1282, 1284 (5th Cir. 1977). Alternatively, although not argued in defendants' briefs, we base our decision on the fact that even in Arkansas the statute of limitations had run on this claim when suit was filed (August 18, 1993). The explosion was on August 21, 1989, the same date the product was sold and delivered. It is true that a four-year statute of limitation appears in the Uniform Commercial Code as originally enacted in 1961. A.C.A. § 4-2-725. However, in 1979, a new three-year statute of limitations was enacted for products cases involving death or injuries. A.C.A. § 16-116-103. This is the proper limitations statute to be applied in this case. A breach of warranty, express or implied, where personal injuries are sustained is a product liability action. In the Arkansas Model Jury Instructions, warranty instructions are included under chapter 10, the product liability chapter (Arkansas Model Jury Instructions Civil 3d) West, 1989. A product liability action is defined in the Arkansas statutes as follows:

> (5) "Product liability action" includes all actions brought for or on account of personal injury, death, or property damage caused by, or resulting from, the manufacture, construction, design, formula, preparation, assembly, testing, service, warning, instruction, marketing, packaging, or labeling of any product.

A.C.A. § 16-116-102(5).

In their brief in the Fifth Circuit, plaintiffs conceded that the Arkansas Statute of Limitations is three years (see page 29 of the brief of the plaintiffs filed in the Eighth Circuit).

It follows that the defendants' motions for summary judgment should be granted.

/s/ Henry Woods
HENRY WOODS
UNITED STATES
DISTRICT JUDGE

DATE: 1-12-94

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KENT ANDREW FOLLETTE and JANE ELIZABETH FOLLETTE, individually and as next of friend of Andrwe [sic] Stephenson Follette, a minor child — PLAINTIFFS

v. NO. LR-C-93-577

WAL-MART STORES, INC., d/b/a Sam's Wholesale Club and/or Sam's Wholesale Club, a division of Wal-Mart Stores, Inc. — DEFENDANT

ORDER

(Filed Feb. 4, 1994)

The plaintiffs have filed a motion for reconsideration. For the reasons advanced by defendant in its response, the motion is denied.

IT IS SO ORDERED this 3rd day of February, 1994.

/s/ Henry Woods
HENRY WOODS,
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KENT ANDREW FOLLETTE and JANE ELIZABETH FOLLETTE, individually and as next friend of Andrew Stephenson Follette, a minor child — PLAINTIFFS

v. — NO. LR-C-93-577

WAL-MART STORES, INC., d/b/a Sam's Wholesale Club or Sam's Wholesale Club, a division of Wal-Mart Stores, Inc. — DEFENDANTS

JUDGMENT

(Filed Jan. 13, 1994)

Pursuant to the Memorandum Opinion and Order entered this day, judgment is entered for the defendants. The complaint is dismissed with prejudice.

IT IS SO ORDERED this 12 day of January, 1994.

/s/ Henry Woods
HENRY WOODS,
U.S. District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 93-4347
Summary Calendar

KENT ANDREW FOLLETTE AND JANE ELIZABETH FOLLETTE,
Individually and as Next Friends of Andrew Stephenson Follette, a Minor Child,
*Plaintiffs-Appellants,*

V.

CLAIROL, INC., et al.,
*Defendants-Appellees.*

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**Appeal from the United States District Court for the Western District of Louisiana**

**No. (92-CV 0754)**

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Before HIGGINBOTHAM, SMITH, and DEMOSS, Circuit Judges.

PER CURIAM:

The plaintiff parents sued Clairol, Inc. ("Clairol"), and Walmart Stores, Inc. ("Walmart"), in the United States District Court for the Eastern District of Texas, on the basis of diversity jurisdiction, for injuries allegedly sustained by their child from the explosion in Louisiana of a jug of hair spray. The defendants moved to dismiss for want of personal jurisdiction. The district court, finding an inconvenient forum, transferred the matter to the United States District Court for

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a).

In light of the intervening decision in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1047 (1993), the district court held that the Texas court never had acquired personal jurisdiction over the defendants and that, accordingly, the Louisiana federal court was free to apply Louisiana's one-year prescriptive period. The court thus granted defendants' motion for summary judgment on the grounds of prescription.

The district court based its judgment upon the reasons given by the magistrate judge in his comprehensive, sixteen-page Report and Recommendation entered February 2, 1993. We find the magistrate judge's analysis persuasive, and we AFFIRM essentially for the reasons set forth in that report.

**Kent Andrew FOLLETTE and Jane Elizabeth Follette, Individually and as Next Friend of Andrew Stephenson Follette, a minor child**

**v.**

**CLAIROL, INC. and Wal-Mart Stores, Inc., d/b/a Sam's Wholesale Club and/or Sam's Wholesale Club, a Division of Wal-Mart Stores, Inc.**

**Civ. A. No. 92-0754-M.**

United States District Court,
W.D. Louisiana,
Monroe Division.

March 15, 1993.

*JUDGMENT*

TRIMBLE, District Judge.

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein and after an independent review of the record including the objections filed therein, and a *de novo* determination of the issues, and having determined that the findings are correct under the applicable law; it is

ORDERED that the Motions for Summary Judgment of Clairol, Inc. and Wal-Mart Stores, Inc. d/b/a Sam's Wholesale Club be and they are hereby GRANTED dismissing plaintiffs' claims against defendants with prejudice.

***REPORT AND RECOMMENDATION***

WILSON, United States Magistrate Judge.

Presently before the court are motions for summary judgment filed by Clairol, Inc. (Clairol) and Wal-Mart Stores, Inc. d/b/a Sam's Wholesale Club (Wal-Mart). They have been referred to the undersigned Magistrate Judge for a report and recommendation in accordance with 28 U.S.C. § 636(b)(1)(B).

This is a products liability action arising out of an accident occurring on August 21, 1989 in Louisiana. The product was purchased in Louisiana. It was not manufactured in Texas. The plaintiffs are residents of Louisiana. The claim has absolutely no relationship or connection with the State of Texas except for the fact that, on August 12, 1991, plaintiffs filed suit in the United States District Court for the Eastern District of Texas.

The obvious purpose for filing the suit in Texas was to secure the benefit of Texas' two year prescriptive period. Had plaintiffs filed this suit in Louisiana their claims against both Clairol and Wal-Mart would have been prescribed. However, under Texas' choice of law rules, the Texas court would be required to apply Texas' two year statute of limitations. Texas Civil Practice and Remedies Code § 71.031; *Culpepper v. Daniel Industries, Inc.*, 500 S.W.2d 958, 958-959, (Tex.Civ.App. Houston [1st Dist.] 1973); *writ. refused NRE* (Jan. 23, 1974).

Both Wal-Mart and Clairol filed motions to dismiss or, in the alternative, transfer the case, contending that the Texas court had neither *in personam* jurisdiction over the defendants nor any interest in the claims. The United States District Judge for the Eastern District of Texas denied the motions to dismiss or transfer for lack of personal jurisdiction. The denial was based upon the court's conclusion that both Wal-Mart and Clairol had consented to be subject to the general personal jurisdiction of the Texas courts by applying for and being issued a certificate of authority to do business. The court, nevertheless, transferred the case to the Western District of Louisiana pursuant to 28 U.S.C. § 1404(a) "in the interest of justice" and "for the convenience of parties and witnesses." (*See* 4/23/92 Order of Judge Sam B. Hall, Jr.)

Both Clairol and Wal-Mart now contend that the claims against them have prescribed. The prescription issue turns on whether Louisiana's one year statute of limitations (LSA-C.C. art. 3492) or Texas' two year statute of limitations (Art. 5526 Vernon's Ann. Civil Statutes) applies. The question of which prescriptive period applies, in turn, depends upon whether a

Texas court could constitutionally exercise *in personam* jurisdiction over each of the defendants.

If Texas could constitutionally exercise *in personam* jurisdiction over the defendants this court is required to apply the Texas statute of limitations. *See Ferens v. John Deere Co.*, 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990). On the other hand, if the defendants were not subject to the *in personam* jurisdiction of the Texas court then the Louisiana statute of limitations applies. *McTyre v. Broward General Medical Center,* 749 F.Supp. 102 (D.N.J.1990). Thus, we reach the issue of *in personam* jurisdiction in an effort to decide whether the plaintiffs' claims have prescribed.

Plaintiffs contend that the jurisdictional issue has been decided and is now the law of this case. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 814-16, 108 S.Ct. 2166, 2177-78, 100 L.Ed.2d 811 (1988). Defendants argue that previous findings relative to jurisdiction were mere dicta that this court is free to disregard. The previous ruling on personal jurisdiction cannot be merely dismissed as dicta. The Judge denied the motions to dismiss or transfer for lack of jurisdiction. His ruling leaves no room to doubt that the reason for doing so was his conclusion that the Texas courts could exert general *in personam* jurisdiction over the defendants. Nevertheless, this court concludes that it is appropriate for it to re-examine the jurisdictional issue.

Generally, "when a court decides upon a rule of law that decision should continue to govern the same issues in subsequent stages of the same case." *Christianson, supra* at 814, 108 S.Ct. at 2177. This principle applies equally to the court's own decisions and to the decisions of a coordinate court. *Id.* It is especially applicable to a transfer decision because of the threat of sending the "litigants into a vicious cycle of litigation." *Id.* at 816, 108 S.Ct. at 2178.[1] However, a court has the power to revisit prior decisions although it "should be loathe

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[1] Contrary to the plaintiffs' contention, it is not the transfer decision that this court is being ask [sic] to reconsider. Regardless of this court's holding the case is not going to be retransferred back to Texas.

to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Id.* (*quoting Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1982)).

The Judge's finding that the Texas court had personal jurisdiction over the defendants was based solely upon his conclusion that the defendants were deemed to have consented to be subject to the general personal jurisdiction of the Texas courts by virtue of their having complied with the requirements of the State of Texas for obtaining authority to do business in that state. Subsequent to the ruling, the United States Fifth Circuit Court of Appeal handed down its decision in *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir.1992). The court specifically held that qualifying to do business in Texas was insufficient to subject the defendant to the general *in personam* jurisdiction of the Texas courts. "[A] foreign corporation that properly complies with the Texas Registration statute only consents to personal jurisdiction where such jurisdiction is constitutionally permissible." *Id.* at 183.

*Siemer* directly conflicts with the basis for the prior decision in this case regarding the issue of personal jurisdiction. This is the type of extraordinary circumstance that justifies revisiting the issue of personal jurisdiction.

The plaintiffs argue that Texas state law controls the issue of jurisdiction before the court. They cite decisions supporting their claim that Texas courts have held that a corporation, by qualifying to do business in Texas and appointing an agent for service of process in Texas, consents to being subject to the jurisdiction of the Texas courts for all claims regardless of the relationship between the forum and the litigation. *See Goldman v. Pre-Fab Transit Co.*, 520 S.W.2d 597, 598 (Tex.Civ.App.–Houston [14th Dist.] 1975); *Acacia Pipeline Corp. v. Champlin Exploration, Inc.*, 769 S.W.2d 719 (Tex.Civ.App.–Houston [1st Dist.] 1989); *Prejean v. Sonatrach, Inc.*, 652 F.2d 1260, 1270 n. 21 (5th Cir.1981). This position has no merit. State law controls only

if the exercise of personal jurisdiction is consistent with the limits imposed by the Due Process Clause of the Fourteenth Amendment. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952); *Smith v. DeWalt Products Corp.*, 743 F.2d 277, 278 (5th Cir.1984). The decision in *Siemer* was clearly based upon the limits imposed by the due process clause.[2]

The due process clause of the Fourteenth Amendment places limits on the State's exercise of its judicial power over foreign corporations. *International Shoe Co. v. Washington*, 326 U.S. 310, 315, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). It requires, as a predicate to the exercise of personal jurisdiction, that the foreign corporation have contacts with the foreign state that "make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought there." *Id.* The result is a test that is neither mechanical nor qualitative. *Id.* at 317, 66 S.Ct. at 159. "[T]he relationship among the defendant, the forum, and the litigation . . . [is] the central concern of the inquiry into personal jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413, 104 S.Ct. 1868, 1872, 80 L.Ed.2d 404 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 2580, 53 L.Ed.2d 683 (1977).

When, as here, the litigation has no relationship whatsoever to the corporation's purposeful contacts with the forum state the focus narrows to the relationship between the defendant and the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. at 413, 104 S.Ct. at 1872. Personal jurisdiction under these circumstances has been categorized

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[2] The interpretation plaintiffs suggest raises both due process and commerce clause concerns. *See Lewis, Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 Del.J.Corp. L.1 (1990); *Kipp, Inferring Express Consent: The Paradox of Permitting Registration Statutes to Confer General Jurisdiction*, 9 Rev.Litig. 1 (1990).

and labeled as general personal jurisdiction.[3] *Id.; Siemer v. Learjet Acquisition Corp., supra; Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir.1987).

The U.S. Supreme Court has provided little specific guidance as to the precise limits on the exercise of general personal jurisdiction. In the more than 40 years since its decision in *International Shoe Co. v. Washington*, the Court has decided only two cases specifically addressing general personal jurisdiction.

*Perkins v. Benguet Consolidated Mining Co., supra*, 342 U.S. at 437, 72 S.Ct. at 413 is the only case since *International Shoe* where the Supreme Court found that general personal jurisdiction was permissibly exercised by a state court. The defendant's mining operations in the Philippine Islands were completely stopped during the Japanese occupation. The president-general manager-principal stockholder of the defendant corporation returned to his home in Ohio. While in Ohio he carried on "continuous and systematic supervision of the necessarily limited war time activities of the company." *Perkins*, 342 U.S. at 446, 72 S.Ct. at 419. The corporation's records were kept in Ohio. The directors' meetings were held in Ohio. Corporate bank accounts were located in Ohio and all key business decisions were made there. In short, Ohio was the "principal, if temporary, place of business" for the corporation. (*quoting Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779, 104 S.Ct. 1473, 1481, 79 L.Ed.2d 790 (1984)). Noting that the "essence of the issue" was of "general fairness to the corporation" the Court focused

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[3] "It has been said that when a State exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the State is exercising 'specific jurisdiction' over the defendant." (citation omitted) *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413 n. 8, 104 S.Ct. 1868, 1872 n. 8.

"When a State exercises personal jurisdiction over a defendant in a suit not arising out of or related to the defendant's contacts with the forum, the State has been said to be exercising 'general jurisdiction' over the defendant." (citations omitted) *Id.* at n. 9.

its inquiry on whether the nature and amount of the defendant's activities in Ohio made it "reasonable and just to subject the corporation to the jurisdiction" of the Ohio courts. *Perkins*, 342 U.S. at 444, 72 S.Ct. at 418. After defining the issue in these terms the Court simply concluded that, under these circumstances, an exercise of general personal jurisdiction was not prohibited by the due process clause.

The Court considered the issue of general personal jurisdiction for the second and last time in *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra*. The question before the Court was whether a foreign corporation could be sued in a Texas court on claims arising out of a helicopter crash in Peru. The parties made no argument that the claim had any relationship to the defendants' contact with the State of Texas. 466 U.S. at 413 at n. 10, 104 S.Ct. at 1872 at n. 10. The Court examined the defendant's contacts with the State of Texas in order to determine whether they constituted "the kind of continuous and systematic general business contacts the Court found to exist in *Perkins*" and then held that they did not. 466 U.S. at 413-16, 104 S.Ct. at 1872-73. The Court summarized the defendant's contacts with the State of Texas as follows:

> "It is undisputed that Helicol does not have a place of business in Texas and has never been licensed to do business in the state. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account drawn on a Houston bank; purchasing helicopters, equipment and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training." 466 U.S. at 416, 104 S.Ct. at 1873.

These two decisions do little more than establish that an exercise of general personal jurisdiction is permissible in a corporation's principal place of business and is not permissible when the corporation's contacts with the forum state are no greater than those found in *Helicopteros Nacionales de*

*Columbia, S.A. v. Hall.* The facts of the present case place it in the broad gray area that lays in between.

The analysis under the due process clause has been further refined into two steps. *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359 (5th Cir.1990); *Bearry v. Beech Aircraft Corp., supra.* The first step involves an inquiry into whether there are "certain minimum contacts" with the forum state. *Id.* Compared to specific personal jurisdiction, contacts more extensive in nature and quality are required for general personal jurisdiction. *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra; Dalton v. R & W Marine, Inc., supra; Bearry v. Beech Aircraft Corp., supra.* Where, as here, the cause of action does not arise out of defendant corporation's purposeful contacts with the forum state there must be "continuous and systematic contacts" between the state and the foreign corporation to clear this first hurdle. *Id.*

If the plaintiff establishes the required minimum contacts the court's focus shifts to whether the exercise of general personal jurisdiction is fair and reasonable under the circumstances. *ASAHI Metal Ind. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987); *Dalton v. R & W Marine, Inc., supra; Bearry v. Beech Aircraft Corp., supra.* This inquiry requires that the court consider: (1) the burden on the defendant, (2) the interests of the forum state, (3) the plaintiffs' interest in obtaining relief, (4) the judicial system's interest in obtaining the most efficient resolution of controversies, and (5) the shared interests of the several states in furthering fundamental substantive social policies. *ASAHI Metal Ind. v. Superior Court, supra* 480 U.S. at 113, 107 S.Ct. at 1033; *Dalton v. R & W Marine, Inc., supra* 897 F.2d at 1363.

Both Clairol and Wal-Mart have substantial and continuous contacts with Texas. They are both authorized to do business in Texas. As required by law, they have appointed agents for service of process in Texas. Wal-Mart's additional contacts with Texas include:

1. Operation of approximately 264 large scale retail outlets in Texas;

2. Deriving substantial income from the sale of goods in Texas;
3. Ownership of real and personal property located in Texas;
4. Ownership of a Texas corporation;
5. Employment of a substantial number of Texas residents.

(*See* Plaintiffs' Response and Brief in Opposition to Defendant Wal-Mart's Motion to Dismiss or Transfer)

Clairol's contacts with Texas include:

1. Location of a business office in Texas;
2. The location of division regional offices in Texas;
3. Ownership of personal property located in Texas;
4. Payment of Texas property taxes;
5. Deriving substantial revenue from the sale and marketing of its products in Texas;
6. Payment of Texas franchise taxes.

(*See* Plaintiffs' Memorandum in Rebuttal to Clairol's Reply Brief p. 3, record item # 25)

The court finds that plaintiffs have established that there is at least a genuine issue as to whether defendants have the necessary minimum contacts with the State of Texas. *See Rittenhouse v. Mabry,* 832 F.2d 1380, 1390 (5th Cir.1987). This requires the court to address the issue of whether the exercise of general jurisdiction is fair and reasonable under the circumstances of this case.

There are persuasive arguments that the states with power to exercise general personal jurisdiction over a corporation should be limited to the state of incorporation and the state where the corporation's principal place of business is located. *See Twitchell, The Myth of General Jurisdiction,* 101 Harv.L.Rev. 610 (1988), (hereafter referred to as "*Twitchell,*

*The Myth*"); *von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv.L.Rev. 1121 (1966).[4] This court agrees that this is the "fair" and "reasonable" place to draw the line on permissible exercise of general personal jurisdiction under the circumstances presented in *this* case.

Such a limit strikes the proper balance between the interests of the defendants and the interests of the plaintiffs and the states. It "raises few of the risks associated with broader general jurisdiction, yet insures plaintiffs of a place to sue, provides predictability for defendants, and comports with international jurisdiction standards. This approach also increases the possibility that the plaintiff will find a forum where it can sue multiple defendants. . . . The exercise of dispute blind jurisdiction at the defendant's home-base comports with the historical meaning of general jurisdiction. . . ." *Twitchell, The Myth*, at fn. 269.

Where defendant is called upon to defend the litigation in a forum having no relationship to the controversy there is a real burden on the defendant. *Bearry v. Beech Aircraft Corp., supra* 818 F.2d at 377. This fact was recognized by the U.S. District Court for the Eastern District of Texas in the present case when it ordered this case transferred to the Western District of Louisiana.[5] The fact that the litigation has no relationship to the forum state means that the defendant will be called upon to defend itself where no witnesses may be compelled to testify except by deposition taken outside the

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[4] There have been a number of other suggestions as to different criteria for determining when general personal jurisdiction is permissible. *See* for example *George, In Search of General Jurisdiction*, 64 Tul.L.Rev. 1097 (1990); *Brilmayer, et al. A. General Look at General Jurisdiction*, 66 Tex.L.Rev. 721 (1988).

[5] While the transfer pursuant to 28 U.S.C. § 1404 reduces the burden to a great extent it does so by requiring the case be tried in Louisiana. It is difficult to understand how this can lend much weight to the position that it is fair and reasonable for Texas courts to exercise personal jurisdiction in this case. (*but see Burnham v. Superior Court of California*, 495 U.S. 604, 638 at n. 13, 110 S.Ct. 2105, 2125 at n. 13, 109 L.Ed.2d 631 (1990) (Brennan, J., concurring opinion)).

forum. The defendant will likely have to bear the travel expenses of those witnesses who can be convinced to voluntarily appear at the trial. Further, the forum state's court will have to adjudicate the defendant's rights by applying and interrupting the laws of another state. It is clear that the courts of the state whose substantive law will apply are best suited for this task.

The forum state's interest is tenuous at best. The plaintiff is not a resident. None of the significant events occurred there. The forum state's lack of interest is reflected in the fact that if it heard the case it could not apply its own substantive law to the extent that it materially conflicted with Louisiana law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981). The forum state may have some general interest in the defendant's affairs because it is, to some extent, a participant in the state's economy and, possibly, the state's political process. But this interest is so slight and so inferior to the interests of other states that it lends little support to an argument that the exercise of general personal jurisdiction is fair and reasonable.

Plaintiffs' interest in obtaining fair and effective relief is served by the availability of forums in states with specific personal jurisdiction (especially Louisiana) and in the state or states where the corporations are incorporated and where their principal place of business is located.

The consideration of the judicial system's interest in obtaining effective resolution of controversies would weigh in favor of limiting general personal jurisdiction as suggested. Significantly, this is not a case where exertion of personal jurisdiction by a Texas court is necessary to allow plaintiff to conveniently join all parties in one suit.

Further, in this case, this court is unable to discern any fundamental social policy that would be significantly furthered by allowing Texas, a state with no interest in the controversy, to adjudicate it. These considerations have led this court to conclude that Texas could not, consistent with

the due process clause of the Fourteenth Amendment, exercise general personal jurisdiction over the defendants in this case.

*Cowan v. Ford Motor Co.*, 694 F.2d 104 (5th Cir.1982) reached a different result on substantially identical facts. However, for the reasons that follow, it does not control the decision in this case. Most importantly, *Cowan* was decided prior to *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra.* Therefore, it failed to recognize the distinction between specific personal jurisdiction and general personal jurisdiction. More specifically the court in *Cowan* failed to recognize that general personal jurisdiction requires "the kind of continuous and systematic general business contacts the court found to exist in *Perkins.*" 466 U.S. at 416, 104 S.Ct. at 1873. As previously noted, the exercise of general personal jurisdiction requires contacts that are more extensive in nature and quality than those required for the exercise of specific personal jurisdiction. The court in *Cowan* concluded that "sufficient contacts indisputably are present" by relying on cases involving the exercise of specific personal jurisdiction. 694 F.2d at 107 n. 8. This, together with subsequent Supreme Court cases refining the analysis of the limits on the exercise of personal jurisdiction, leads this court to conclude that the decision in *Cowan* does not control the issue of personal jurisdiction before the court.[6]

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[6] Frankly, *Cowan* cannot be easily reconciled with the decision in *Siemer v. Learjet Acquisition Corp., supra.* In *Cowan* the court distinguished *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir.1966) and other cases stating:

> "In *Birdsong* and its progeny, the question is whether it is fair and reasonable to compel the defendant to come into the forum to defend the suit. Here, Ford has already come into Mississippi and voluntarily subjected itself to Mississippi process. It is agreed to be treated as a resident corporation. By appointing a resident agent and conducting substantial business in

This court concludes that the Texas courts could not constitutionally exercise personal jurisdiction over the defendants in this matter when the suit was filed. Therefore, *Ferens v. John Deere Co., supra* does not apply. Louisiana's one year statute of limitations is applicable. The plaintiffs' claims have prescribed.

Accordingly, IT IS RECOMMENDED that the defendants' Motions for Summary Judgment on the basis of prescription be GRANTED and that plaintiffs' claims against defendants be DISMISSED WITH PREJUDICE.

Under the provisions of 28 U.S.C. 636(b)(1)(C) the parties have ten (10) business days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE WILL BAR AN AGGRIEVED PARTY FROM ATTACKING THE FACTUAL FINDS [sic] ON APPEAL.

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Mississippi, it has consented to Mississippi's exercise of personal jurisdiction." 694 F.2d at 107.

Thus, the court appeared to rely heavily on the fact that Ford had registered to do business in Mississippi and had appointed an agent for service of process in Mississippi. In *Siemer* the court held that the registration to do business in the State of Texas and the appointment of an agent for service of process was "of no special weight in evaluating general personal jurisdiction." 966 F.2d at 181. The exact criteria the court in *Cowan* used to find jurisdiction is unclear. It could be reasonably argued that the court based its finding on the defendant's consent to the forum's jurisdiction by virtue of having registered to do business and appointing an agent for service of process. It could also be reasonably argued that the decision was based upon a "minimum contacts" analysis. Since it is not clear that the decision in *Cowan* is in direct conflict with the decision in *Siemer* this court is bound to follow the latter decision.

**Kent Andrew FOLLETTE, individually and as next friend of Andrew Stephenson Follette, a minor child; Jane Elizabeth Follette, individually and as next friend of Andrew Stephenson Follette, a minor child, Appellants,**

**v.**

**WAL-MART STORES, INC., doing business as Sam's Wholesale Club, a division of Wal-Mart Stores, Inc., Appellee.**

**No. 94-1458.**

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 11, 1995.

Decided March 1, 1995.

Before RICHARD S. ARNOLD, Chief Judge, WOLLMAN and BEAM, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

This opinion is the second in which we attempt to sort out the procedural morass entangling this case. In this opinion we address whether Kent and Jane Follette's individual claims, as opposed to those brought on behalf of their minor son, are barred by the Arkansas statute of limitations. For the reasons set forth below, we affirm that portion of the District Court's summary judgment which dismisses the Follettes' individual claims. In all other respects, we adhere to our original opinion.

I.

The Follettes' son was injured when a jug of hairspray purchased from Wal-Mart exploded on August 21, 1989. The Follettes' first attempt to recover for damages received in that accident, on a products-liability theory, ended with a summary judgment in favor of Wal-Mart because the action was not filed within Louisiana's limitations period. The Follettes then filed this breach-of-warranty action in the United States

District Court for the Eastern District of Arkansas. Wal-Mart was granted summary judgment on the alternative grounds of res judicata and limitations by the Arkansas Court. The Follettes appealed.

In our first opinion, we held that the breach-of-warranty suit brought by the Follettes on behalf of their minor son, Andrew, was not barred by the Arkansas statute of limitations because of the Arkansas minority savings statute. Additionally, we held that the Follettes' suit fell within the "exceptional circumstance" exception to the Louisiana res judicata statute. Thus, we reversed the District Court's grant of summary judgment in favor of Wal-Mart as to the claims brought on behalf of Andrew Follette by his parents. *Follette v. Wal-Mart Stores*, 41 F.3d 1234 (8th Cir.1994).

In its petition for rehearing Wal-Mart has pointed out that Mr. and Mrs. Follette, in addition to the claims brought on behalf of their son, brought certain claims in their own right. Citing our holding that the three-year statute of limitations governing products-liability actions applies to this suit, Wal-Mart argues that the Follettes' suit in their own right is barred. The Follettes, on the other hand, argue that the statute of limitations was tolled by the filing of their original suit, which was still pending in the Supreme Court of the United States on petition for writ of certiorari when this suit was filed. Alternatively, the Follettes argue that Arkansas's general savings statute applies to this case. Thus, they claim they had an additional year after the denial of certiorari by the Supreme Court in which to file this suit.

The petition for rehearing by the panel is granted, and we now consider on their merits the arguments with respect to the limitations period governing the Follettes' suit in their own right.[1]

---

[1] In all other respects, Wal-Mart's petition for rehearing is denied. A separate order is being entered denying Wal-Mart's suggestion for rehearing en banc.

II.

If the Follettes' individual claims survive, they do so only by operation of the savings statute. Under this statute, "if any action is commenced within the time prescribed . . . and the plaintiff therein suffers a nonsuit, . . . the plaintiff may commence a new action within (1) one year. . . . " Ark.Code Ann. § 16-56-126 (Michie 1987). The statute is written in the conjunctive, meaning two conditions must be met in order to fall within its language; the original action must be timely, and the plaintiff must suffer a nonsuit in that action. *Young v. Garrett,* 212 Ark. 693, 698, 208 S.W.2d 189, 192, *cert. denied,* 335 U.S. 814, 69 S.Ct. 31, 93 L.Ed. 369 (1948); *Hill v. Pipkins,* 72 Ark. 549, 81 S.W. 1216 (1904). The Follettes cannot benefit from the savings statute because they did not suffer a nonsuit in their original action.

A nonsuit, under the savings statute, is suffered when plaintiffs "from causes incident to the administration of law, are compelled to abandon their present action, whether by their own act or the act of the court, when either would leave them a cause of action, yet undetermined. . . . " *State Bank v. Magness,* 11 Ark. 343, 346 (1850). Thus, where a plaintiff's suit is dismissed due to want of diversity of citizenship, *Carton v. Missouri Pacific Railroad Co.,* 295 Ark. 126, 747 S.W.2d 93 (1988), or of a federal question, *Lubin v. Crittenden Memorial Hosp.,* 288 Ark. 370, 705 S.W.2d 872 (1986), or when the first suit is filed in the incorrect court and is subsequently transferred, *Linder v. Howard,* 296 Ark. 414, 757 S.W.2d 549 (1988), the savings statute applies, and the plaintiff is given an extra year in which to reinstitute the suit. Where, however, a suit is dismissed with prejudice for failure to prosecute, no nonsuit has been suffered, and the statute does not apply. The plaintiff's only remedy is to appeal the original decision. *Harris v. Moye's Estate,* 211 Ark. 765, 202 S.W.2d 360 (1947).

In the case before us, the Follettes had summary judgment entered against them in their first suit. A summary judgment does not leave "a cause of action, yet undetermined." It is a disposition with prejudice and decides the case

as surely and finally as if the case had been tried with a verdict adverse to the Follettes. While the Follettes correctly assert that the savings statute is to be liberally construed, the Follettes did not suffer a nonsuit and cannot reap the benefit of the savings statute's period of grace.

III.

The Follettes filed their individual claims more than three years after the events giving rise to their cause of action. They do not benefit from the savings statute because they did not suffer a nonsuit in their original action. Thus, that portion of the District Court's judgment dismissing the claims of Kent and Jane Follette, individually, is affirmed. In all other respects, the petition for rehearing is denied, and we adhere to our original opinion. Accordingly, so far as the action on behalf of the Follettes' minor child is concerned, the judgment is reversed, and the cause remanded for further proceedings not inconsistent with our opinions.

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(2)

In The

# Supreme Court of the United States

October Term, 1994

WAL-MART STORES, INC.
d/b/a SAM'S WHOLESALE CLUB and/or
SAM'S WHOLESALE CLUB, a Division of
WAL-MART STORES, INC.,

*Petitioner,*

v.

KENT ANDREW FOLLETTE and JANE
ELIZABETH FOLLETTE, Individually and
as Next Friend of ANDREW STEPHENSON
FOLLETTE, a Minor Child,

*Respondents.*

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a lawsuit filed in Arkansas district court, the Eighth Circuit refused to apply *res judicata* to bar Respondents' Uniform Commercial Code (UCC) breach-of-warranty action. Respondents' breach-of-warranty claims could not have been brought in the earlier Louisiana lawsuit since Louisiana has not adopted Article 2 of the UCC. In so holding, the Eighth Circuit applied a Louisiana statute, La. Rev. Stat. Ann. § 13:4232, which permits a second action by a plaintiff if "exceptional circumstances" justify relief from the effects of *res judicata*. The Eighth Circuit found that, because "exceptional circumstances" were created by the very unusual procedural facts of this case, Respondents were not barred from pursuing their Arkansas breach-of-warranty suit.

Does the Eighth Circuit's choice-of-law decision to apply a Louisiana *res judicata* statute create an intercircuit conflict or provide any other reason to grant certiorari?

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## STATEMENT OF THE CASE

An accurate statement of the case and proceedings below is reported in the opinions of the Eighth Circuit (Petition for Writ of Certiorari App. 1a-8a; 33a-36a) *Follette v. Wal-Mart Stores, Inc.*, 41 F.3d 1234 *reh'g granted* 47 F.3d 311.

## REASONS FOR DENYING WRIT

The Eighth Circuit explained its choice-of-law decision regarding the doctrine of *res judicata* as follows:

> When a federal court is sitting in diversity, the preclusive effect of a prior judgment is determined by the preclusion rules of the forum which provided the substantive law underlying that prior judgment. *Hicks v. O'Meara*, 31 F.3d 744, 746 (8th Cir. 1994). This rule applies when the original judgment is that of another federal court sitting in diversity. *Austin v. Super Valu Stores*, 31 F.3d 615, 617-18 (1994).

See Petition for Writ of Certiorari, App. 5a.

This proposition originates by authority of the Full Faith and Credit Clause of the United States Constitution, U.S. Const. Art. IV § 1, and its statutory complement, 28 U.S.C. § 1738. These provisions require that federal courts sitting in diversity lend prior diversity judgments of other federal courts the same full faith and credit as would exist between two state courts. In such situations, state, not federal, law dictates the outcome. *Semler v. Psychiatric Institutes of Washington D.C. Inc.*, 575 F.2d 922 (D.C. Cir. 1978).

Petitioners suggest that the decisions of the Eighth Circuit complicate and confuse an already conflicting jumble of views. They define two emerging lines of cases, one group forming a majority rule, which obliges federal courts to apply only federal law on *res judicata* matters, *Kern v. Hettinger,* 303 F.2d 333 (2d Cir. 1962), and a minority rule mandating that a federal court sitting in diversity look to the *res judicata* law of the state where it sits for guidance, *Gramm v. Lincoln,* 257 F.2d 250 (9th Cir. 1958). Petitioners contend the Eighth Circuit decisions are out of step with both majority and minority rules thereby making new law where none existed. See Petition for a Writ of Certiorari, at 11-13. Actually, the Eighth Circuit's decisions track a long line of cases employing state law from the first forum to determine the *res judicata* effects of an earlier diversity judgment. *Gatzemeyer v. Vogel,* 589 F.2d 360, 362 (8th Cir. 1978); *Wilson v. Retail Credit Co.,* 474 F.2d 1260 (5th Cir. 1973); *Hayles v. Randall Motor Co.,* 455 F.2d 169, 173 (10th Cir. 1971); *Provident Tradesmens Bank & Trust Co. v. Lumbermens Mut. Cas. Co.,* 411 F.2d 88, 94-95 (3d Cir. 1969) (preclusion within the course of a single diversity action); *Makarim v. Rinard,* 336 F.2d 333, 334 (3d Cir. 1964); *Rust v. First National Bank,* 466 F. Supp. 135, 138 (D. Wyo. 1979); *Skrzat v. Ford Motor Co.,* 389 F. Supp. 753 (D.R.I. 1975); *Forrester v. Southern Ry.,* 268 F. Supp. 194, 195-196 (D.C. Ga. 1967).

Nevertheless, a number of circuits have announced that federal *res judicata* principles rather than state law be applied as a choice of law. However, evaluation of the circumstances behind these divergent opinions generally reflects the existence of *an overriding federal interest. Semler* provides clarity to these apparently dissimilar decisions:

> [W]e believe that the principles of Erie * * * and the mandate of the Full Faith and Credit Clause as supplemented by 28 U.S.C. § 1738 require a federal court exercising diversity jurisdiction in forum II to give to the judgment of a federal court exercising diversity jurisdiction in forum I the same full faith and credit that a state court in forum II would be obliged to give the judgment of a state court in forum I, *at least in the absence of an overriding federal interest.*

575 F.2d at 927-928 (emphasis added).

Put another way, *if there is an overriding federal interest,* federal principles will apply notwithstanding the *Erie* doctrine, the Full Faith and Credit Clause and 28 U.S.C. § 1738. However, when no overriding federal interest exists, state law should control. Consideration of the various leading cases supports this conclusion.

The majority viewpoint is based primarily upon the opinion in *Kern v. Hettinger.* This prototype case involved the *res judicata* effect of a Fed.R.Civ.P. 41(b) want-of-prosecution dismissal. Thus, the integrity of the Federal Rules of Civil Procedure was at stake. Not surprisingly, the Court abandoned any notions of state law and federal rules of *res judicata* were applied. The *Kern* Court stated its concerns:

> *It would be destructive of the basic principles of the Federal Rules of Civil Procedure* to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. * * * [W]e think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established

> and given power also to enforce state created rights.

303 F.2d at 340 (emphasis added).

In another leading and oft-cited case, *Aerojet-General v. Askew*, 511 F.2d 710 (5th Cir. 1975) *cert. denied* 423 U.S. 908 (1975), evidence of collusive conduct jeopardized the power of a prior federal court judgment. The Fifth Circuit, in its opinion, favorably cited the *Kern* decision and followed federal principles of *res judicata*. *Aerojet-General*, however, involved an attack upon a prior federal court order directing specific performance of a land sale contract by state officials, raising a serious federal question. The court recognized the necessity, in such cases, of protecting federal diversity judgments and fending off collusive conduct which might circumvent federal judicial power. A revealing aspect of *Aerojet-General* was the rather direct threat posed to the court's injunctive powers which, in turn, triggered the action of the court. Therein, the Court reasoned, "*nullification of a federal court judgment* would be precisely the result in this case if, as Dade County urges, the District Court had been obliged to follow state law to decide the question of res judicata." 511 F.2d at 716 (emphasis added).

Similarly, other cases have recognized this principle either explicitly or implicitly. For example, in *Southwest Airlines Co. v. Texas Intern. Airlines*, 546 F.2d 84 (5th Cir.1977) *cert. denied* 434 U.S. 832, the Fifth Circuit stated:

> Federal law of *res judicata* controls this case. Even though the holding of Southwest I relied on state law, *the effect of the case on parties and nonparties presents a question of federal law distinct from the local issues decided.*

546 F.2d at 94 (emphasis added). Likewise, in *Williams v. Ocean Transport Lines, Inc.*, 425 F.2d 1183 (3d Cir. 1970), the Court stated:

> *Where so substantial a federal interest is involved* as the multiplicity of claims arising out of seamen's and long-shoremen's accidents, a federal court should be able to decide for itself whether or not a greater preclusionary effect may be given to a prior judgment than would be given in the state of the first forum.

425 F.2d at 1189-1190 (emphasis added).

Once again an overriding federal interest influenced the choice-of-law decision. Federal issues of law arose which were distinct from the state legal issues. This factor predictably governed the court's choice-of-law holding. Evidence of similar federal interests permeate those decisions supporting the majority rule.

The so-called minority rule of the Ninth Circuit advocates reliance upon state law of the *second* forum. *Gramm v. Lincoln*, 257 F.2d 250, 255 & n. 6 (9th Cir. 1958); *Bates v. Union Oil Co.*, 944 F.2d 647, 649 (9th Cir. 1991); *Washington Public Power Supply v. Pittsburgh-Des Moines Corp.*, 876 F.2d 690, 699 (9th Cir. 1989). In each of these cases, however, both courts, first and second, were located in the same state, therefore only one forum's law came into play. Regardless, the willingness of the Ninth Circuit to also rely upon state law suggests that, absent a particular threat to the independence of the federal judicial system, state *res judicata* law, derived from the second forum, presents an acceptable and convenient choice of law.

Federal treatises discuss the seemingly perplexing and confusing differences between the circuits. See 18 Wright, Miller & Cooper, Federal Practice & Procedure § 4472 (1981 & Supp. 1994); 1A Moore's Federal Practice § 0.311[2]. Indeed, varying views appear as each of the circuit courts of appeal proclaim choice-of-law decisions on *res judicata* matters. However, careful examination of the facts and circumstances underlying these cases such as *Kern*, *Aerojet-General* and their progeny, reveal the development of a more practical proposition. If an overriding federal interest presents itself – such as a threat to the Federal Rules of Civil Procedure, or a purely federal question, or an attack upon the inherent power of the federal court system – then the second federal forum is justified, and frequently does apply federal law as a measure of judicial self-defense. Even the Eighth Circuit has supplied appropriate federal *res judicata* law in such situations. *Poe v. John Deere Co.*, 695 F.2d 1103, 1105 (8th Cir. 1982). On the other hand, when no federal interest appears and no threat is posed, a federal court sitting in diversity assumes its role as an adjunct to the state court system, *Sherrill v. McShan*, 356 F.2d 607 (9th Cir. 1966); *see also Guaranty Trust Co. v. New York*, 326 U.S. 99 (1945), and routinely applies state law without controversy. See *Gatzemeyer, supra; cf. Hanna v. Plummer*, 380 U.S. 460 (1965). It might even be argued that applying federal law includes the right of each circuit, if necessary, to draw upon appropriate state law to resolve *res judicata* issues. See *Williams, supra*. This makes sense, particularly in diversity suits of a routine nature that have little or no impact on federal courts or their procedure. Consequently, the conflict as presented here is not really of such importance as to warrant certiorari review.

In any case, the facts underlying this particular decision do not portray an overriding federal interest. Both the Louisiana lawsuit and the second Arkansas action might just as easily have been brought in state court as purely state actions. Diversity of citizenship formed the sole foundation for federal jurisdiction in both cases. Certainly, no threat to an "independent federal judiciary" was detected by the Eighth Circuit. In using Louisiana preclusion law to resolve the issue at hand, the Eighth Circuit simply recognized the practicality of applying state law when no federal interest was involved. *Lane v. Sullivan,* 900 F.2d 1247, 1250 (8th Cir.), *cert. denied* 498 U.S. 847 (1990). In so doing, they achieved a just result consistent with both Louisiana law and federal principles. *Lane v. Peterson,* 899 F.2d 737 (8th Cir.) *cert. denied* 498 U.S. 823 (1990).

Moreover, there exist several practical reasons why this case would be inappropriate for resolving an intercircuit conflict: (1) the peculiar facts of this case do not pose a recurring judicial problem; (2) the *res judicata* law of Louisiana embodied in La. Rev. Stat. Ann. §§ 13:4231, 13:4232 constitute civil *res judicata,* which is different from common law *res judicata* as found in most other states; and finally, (3) the same result would obtain even if federal principles of *res judicata* were used.

First, the peculiar procedural facts of this case are not reasonably capable of repetition. The Eighth Circuit characterized the Follettes' situation as an "odd and complicated series of procedural events" resulting in a "bizarre

predicament." See *Follette, supra.* Because of the case's factual posture, the likelihood of such facts recurring is virtually nil. A recurring problem would, of course, justify a grant of certiorari review, *Glus v. Brooklyn*, 359 U.S. 231 (1959). *Follette* is not such a case.

Second, La. Rev. Stat. Ann. §§ 13:4231, 13:4232 represent civil *res judicata* which is a different concept than the common law variety of *res judicata* found in most jurisdictions. *Welch v. Crown Zellerbach Corp.*, 359 So.2d 154, 156 (La. 1978). As such, this Court in granting certiorari would be evaluating statutory and arguably substantive law of Louisiana. This fact creates unique analytical problems in fashioning a broad decision applicable to common law jurisdictions.

Lastly, the same result would issue even under accepted principles of *res judicata.* See *Lane v. Petersen, supra.* The *Follette* court noted that the Eighth Circuit has previously applied general principles of *res judicata,* including the Restatement of Judgments 2d. The Restatement of Judgments 2d § 26(1)(c) provides an exception to the general rule of preclusion:

> The *plaintiff was unable to rely on a certain theory* of the case or to seek a certain remedy or form of relief in the first action *because of the limitations on the subject matter jurisdiction of the courts* or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief.

Here, the Follettes in their Louisiana lawsuit were prevented from advancing a UCC claim because Louisiana has not adopted Article 2 of the Uniform Commercial Code and does not provide an equivalent remedy. *Jones v. Menard,* 559 F.2d 1282 (5th Cir. 1977). Under general principles of *res judicata* a plaintiff who could not have brought an action or was prevented from relying upon a certain theory in his first action may be permitted to split his claim and maintain a second lawsuit. *Howard v. Green,* 555 F.2d 737 (8th Cir. 1977). Hence, using accepted *res judicata* principles, the Follettes would be allowed to pursue their UCC claim.

In summary and for each of these additional reasons, this case simply does not provide appropriate circumstances for certiorari review.

## CONCLUSION

*Res judicata* is a sound doctrine and is in no danger of being thwarted through the application of state law to successive diversity suits, particularly as in this case. Indeed, *res judicata* will continue to be a useful and strong doctrine even in the face of an occasional and just exception to the general rule against claim preclusion. Accordingly, the decision of the Eighth Circuit and the facts of this case do not create a conflict with decisions of other circuit courts of appeals as to justify certiorari review

by this Court. Respondents request that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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